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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 530

OWEN GOFF, JR., by Owen Goff, Sr., his father and next friend,

Petitioner,

against

SEARS, ROEBUCK AND COMPANY, a corporation,

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No.

OWEN GOFF, JR., by Owen Goff, Sr., his father and next friend,

Petitioner,

against

SEARS, ROEBUCK AND COMPANY, a corporation,

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner respectfully shows:

JURISDICTION.

The judgment of the District Court for the Northern District of Illinois, Eastern Division, in favor of the petitioner was entered on the verdict of the jury on April 18, 1957. (App. 31.) The judgment of the Court of Appeals for the Seventh Circuit reversing the judgment of the District Court was entered on July 14, 1958. The petitioner's petition for rehearing was denied by the Court of Appeals on August 26, 1958. Jurisdiction of this Court is invoked under Title 28 U.S.C. §§ 1254(1) and 2101(c).

OPINIONS BELOW.

The District Court did not render any opinion in this case. The opinion of the Court of Appeals for the Seventh Circuit is reported at 257 F.2d 418. (It is reproduced in the Appendix to this petition.)

STATUTES AND RULES INVOLVED.

BURNS' INDIANA ANNOTATED STATUTES §47-513:

> "In approaching a pedestrian who is walking or standing upon the traveled part of any highway, and not upon a sidewalk, and upon approaching an intersecting highway or curve or corner in a highway where the operator's view is obstructed, every person driving or operating a motor vehicle or motor bicycle shall slow down and give a timely signal with the bell, horn or other device for signaling."

TITLE 28 U.S.C. §1652:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

RULE 51, FEDERAL RULES OF CIVIL PROCEDURE:

Instructions to Jury: Objection:

> "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he ob-

jects and the grounds for his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

STATEMENT.

This case brings to this Court once again the same problem—factual and legal—which was presented in, and presumably resolved by, *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938). Here, as in *Erie*, the plaintiff was a pedestrian walking alongside a large traffic artery; here, as in *Erie*, the plaintiff was badly injured by the carrier utilizing that artery; here, as in *Erie*, the cause of the injury was "something . . . projecting" from the carrier beyond the limits of the highway; here, as in *Erie*, the jury brought in a verdict for the plaintiff on which the trial court entered judgment; here, as in *Erie*, the appellate court upset the judgment because it did not approve of the application of the law of the state where the injury took place. Here, as in *Erie*, this Court should reverse the judgment of the Court of Appeals.

On the night of June 19, 1953—a clear night with good visibility (App. 110, 145, 544)—petitioner, a boy of 16, was walking home from work, going south on the grass-covered parkway which separated the two northbound lanes of highway U.S. 41 from the two southbound lanes. The highway was straight and newly laid out (App. 110, 123). Respondent's truck-trailer combination was a one-year-old unit at the time of the accident and was equipped with modern sealed-beam headlights, in good operating order (App. 546). It was going south. The driver of respondent's truck admittedly saw the petitioner at a distance of 30 feet or more (App. 554, 556). He could have stopped his truck within 10 feet after applying the brakes (App. 554, 555). He did not sound his horn to give petitioner

any warning (App. 561); nor did he apply his brakes until after he had hit petitioner. Petitioner was struck on the back of his head by the rear-view mirror, which extended from the truck, and on the arm by the body of the truck. He was violently thrown to the ground and suffered severe and permanent injuries for which the jury awarded him $55,000.

The only matters in issue here, all other questions having been resolved in petitioner's favor by the Court of Appeals, are two instructions—Plaintiff's Instructions Nos. 15 and 16—which the trial court read to the jury. These read as follows:

> 15. "The court instructs you that there was in full force and effect on and prior to June 19, 1953, a statute of the State of Indiana which provided that every person driving or operating motor vehicles shall slow down and give a timely signal with the horn or other device for signaling when approaching a pedestrian walking or standing upon the traveled part of any highway.
>
> "If you find from the preponderance of the evidence and under the instructions of the court that the defendant operated its tractor and trailer in violation of the above and foregoing statute on the occasion in question and that the defendant carelessly and negligently failed to slow down and to give such a timely signal when approaching the plaintiff, and that the plaintiff was then walking or standing upon the traveled part of highway U S. 41; and that the plaintiff was then injured as a direct and proximate result of the defendant's negligence, if any, and if you further find from a preponderance of the evidence that at the time of the occurrence complained of and at all times prior thereto the plaintiff was in the exercise of ordinary care for his own safety, then you should find the defendant guilty." (App. 680.)

16. "If you believe from the preponderance of the evidence and under the instructions of the court that the driver of the tractor and trailer on the occasion in question, by using his faculties with ordinary and reasonable care in looking out for danger, could and would have discovered the plaintiff in time, in the exercise of ordinary care, to avoid striking him on the occasion in question, and that he negligently failed to do so, as charged in the plaintiff's complaint and as elsewhere set forth in these instructions, and thereby proximately caused or proximately contributed to cause the accident and the injuries, if any, sustained by the plaintiff, and if your further believe from the preponderance of the evidence that the plaintiff, at the time of and at all times prior to the occurrence in question, was in the exercise of due care for his own safety, then you should find the defendant guilty." (App. 679.)

Among a myriad of other objections, respondent took exception to these two instructions in the trial court in the following terms:

"Mr. Vogel: I think, if the Court please, that I should like to object to 15 as well. I thought that I had. Maybe I did not make it clear.

"These instructions, proposed instructions 15 and 16 on behalf of plaintiff, relate to and point out specific claims of the plaintiff with reference to specific alleged facts.

"There is no evidence in this case that the defendant's driver was under an obligation to sound a horn by reason of any facts known to him prior to a time when the sounding of a horn would be too late.

"Next the plaintiff has stated he knew of the approach of these cars, these trucks, and to put upon the defendant the burden of giving warning of something of which the plaintiff was fully aware is placing upon the defendant a burden which is not its under the law.

"As to 16, your Honor, I think it deals generally with the same thing and I should like to make an objection to both of them—No, I am sorry.

"As to 15, if the Court please, it is repetitious of plaintiff's tendered instruction 11. It is repetitious of 11.

"I made a misstatement, if the Court please. I thought that 16 was also summarizing a section of the statute.

"As to 16, if the Court please, I object to its inclusion—I am sorry. As to plaintiff's tendered instruction 16, I object to its inclusion in the Court's charge to the jury for the reason that it contained the following language:

"* * * as charged in plaintiff's complaint and as elsewhere set forth in these instructions * * *'

"The language which is emphasized in this last statement which I have made gives to the instruction summarizing the pleadings a greater prominence and it appears to be an adoption by the Court, and may be so considered by the jury, of the theory of the plaintiff that such elements of damage have been proved or that there is evidence in the cause which may be considered by the jury in support of the same." (App. 628-29.)

The Court of Appeals, having pointed out that respondent's case in that court was "rested on the premise that appellee [petitioner] was on the pavement", an issue which the Court recognized as one properly to be resolved by the jury, went on to hold that there was error in these two instructions, but not on the grounds offered by respondent. The Court of Appeals found error in 15 because it "overemphasized" the obligation placed on the defendant's driver by the Indiana statute, while "minimizing" the duty

of the appellant to exercise due care. It found 16 "prejudicial when considered together with instruction 15."

QUESTIONS PRESENTED.

1. Whether, in a diversity action, a Court of Appeals may disapprove an instruction properly paraphrasing a governing state statute on the ground that the rule contained in the statute "unduly emphasizes" the duty of the defendant under state law.

2. Whether a Court of Appeals may find reversible error in an instruction to the jury on grounds which were never advanced before the trial court, although the "error" could have been "cured" had it been timely raised.

REASONS FOR GRANTING THE WRIT.

1. The judgment of the Court of Appeals for the Seventh Circuit is in conflict with the decision—not merely the doctrine—announced by this Court in *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938).

2. The judgment of the Court of Appeals for the Seventh Circuit is in conflict with the decisions of this Court and of other Courts of Appeals in reversing a judgment on grounds of error in the instructions when the error had not been asserted in the trial court.

3. The judgment of the Court of Appeals for the Seventh Circuit is in conflict with the judgment of this Court in *Gibson* v. *Lockheed Aircraft Service, Inc.*, 350 U.S. 356 (1956).

ARGUMENT.

I. The Court of Appeals' judgment disapproving instructions Nos. 15 and 16 patently violates the obligation of that Court to follow the substantive law of the State of Indiana.

A. The most obvious error in the Court of Appeals' decision is that its ruling on instruction No. 15 constitutes a rejection of the Indiana law of last clear chance. After ruling that the trial court had properly submitted to the jury the question whether the plaintiff was guilty of contributory negligence, the Court of Appeals held that the giving of instruction No. 15 was error because the position of peril in which the plaintiff was situated might have been brought about by his own negligence. There is an obvious contradiction here. Plainly, by the Court's own reasoning, it was competent for the jury to find that the conduct of the plaintiff was free from contributory negligence, in which case any vestige of a reason for refraining to give a charge embodying Indiana statute would be erased. But the vice of the Court's ruling goes deeper than this. Indiana adheres to the humanitarian doctrine of last clear chance. See *Button* v. *Pennsylvania R.R.*, 115 Ind. App. 210, 218-221, 57 N.E.2d 444 (1944). Under that doctrine, even though plaintiff had by his own negligence placed himself in a position of danger, the defendant was liable if, by the exercise of ordinary care, using the facilities available to it at the time, it could have avoided the injury. There was evidence which would have justified a finding by the jury that the defendant's driver, if he had exercised ordinary care, could have seen the plaintiff and not only could have given a warning signal, but could have stopped the vehicle and avoided the injury. Yet the

Court of Appeals ruled that giving an instruction which informed the jury of the driver's duty to give a warning signal "overemphasized" the defendant's duty in the circumstances. The instruction did not go even so far as the law of Indiana warranted in stating the duty of the defendant. A duty to give a warning signal is less stringent than—indeed, is only a lesser part of—the duty to avoid injury by all available means. Even if it be assumed that the plaintiff did by his own negligence place himself in peril—an assumption which the jury verdict would appear to negate—the instruction was correct and could not have prejudiced the defendant. In holding to the contrary, the Court of Appeals was manifestly indulging its dislike of the doctrine of last clear chance. Grant that the doctrine has been criticized and that it is unpopular in some quarters. Under the *Erie* case, it is not competent for a federal court to set at naught the applicable law of the State of Indiana.

B. It is possible—avoiding the plain meaning of the Court of Appeals' ruling—to choose other interpretations of the Seventh Circuit's opinion. But each of the alternatives leads to the same conclusion of patent error on the part of the Court in failing to give effect to the state law. Thus, the Court of Appeals' decision may be read to mean either 1) that the obligation imposed on drivers on Indiana highways by the legislature of that state cannot be pointed out to the jury without also informing them of the pedestrian's obligation of due care; or 2) that the obligation imposed on drivers in the state of Indiana by the legislature of that state cannot be made known to the jury trying a case involving an accident on an Indiana highway; or 3) that the obligation imposed on drivers on Indiana highways by the Indiana legislature cannot be pointed out to the jury where the jury could find on the evidence that

the plaintiff had seen the vehicle in question before it hit him; or 4) that the obligation imposed on drivers on Indiana highways by the Indiana legislature cannot be pointed out to the jury where the jury could find on the evidence that the plaintiff was on the highway at the time he was hit.

1. Accepting the first of these readings of the Court of Appeals' language, it is obvious that the instructions meet the purported requirement. There is no question but that the statute was properly paraphrased in the instruction. The instruction then leaves for the jury the determination of four questions: a) whether respondent violated the statute requiring its driver to slow down and blow the horn; b) whether, if the respondent's driver violated the statute, that violation was careless and negligent; c) whether the petitioner was injured as a result of respondent's negligence, if any; and d) whether the petitioner was in the exercise of ordinary care for his own safety at the time of the accident and at all times prior thereto. Certainly this meets the requirement that the pedestrian's obligations be pointed out to the jury. Moreover, looking at the panel of instructions given to the jury by the trial court, it becomes obvious that the obligation of the petitioner to exercise due care was fully established in the minds of the jury. For example, the trial court clearly told the jury that the respondent's defense was that the petitioner had not exercised appropriate caution: "the defendant denies that the plaintiff was in the exercise of ordinary care for his own safety." (App. 676.) And the trial court also instructed the jury that the "care required of the plaintiff is that degree of care and caution which an ordinary prudent person of the age, capacity and experience of the plaintiff would ordinarily use under the same or similar circumstances." (App. 676.)

2. The second possible construction of the Court of Appeals' reading of the trial court's instruction—that the jury cannot be informed of the Indiana statute—would lay directly in the face of the decisions of this Court. At least since 1938, federal courts have not been free to ignore or reject the applicable substantive law of the state though that law be framed by state courts. *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938). The obligation to abide by state legislative commands in diversity cases has been a controlling principle for a far greater period of time.

3. The third possible reading of the Court of Appeals' ruling is equally prohibited as a rejection of the law of the State of Indiana. The fact that the petitioner had seen the respondent's vehicle approaching would not, under Indiana law, relieve the driver of respondent's truck and trailer from the obligation to comply with the Indiana statute. As was stated by the Indiana Supreme Court, in a case in which the injured party was facing the traffic and was presumed to have seen the car which hit him:

> "While it may be true that the sound of the horn was unnecessary to warn appellee's son of the approach of the car, the fact that the horn was not sounded might have indicated to appellee's son that the appellant would not insist on pursuing his direct course, but would swerve to the left upon the non-occupied part of the highway, and thus avoid a collision." *Pfisterer* v. *Key*, 218 Ind. 521, 530, 33 N.E.2d 330 (1940).

4. The fourth possibility is also one which should avail the respondent naught. On this construction, the Court of Appeals would appear to be saying that if the pedestrian were on the pavement at the time of the accident he could not be entitled to the protection afforded by the Indiana statute. The fact of the matter, however, is that in both

American Carloading Corp. v. *Gary Trust and Savings Bank*, 216 Ind. 649, 25 N.E.2d 777 (1939), and *Pfisterer* v. *Key*, 218 Ind. 521, 33 N.E.2d 330 (1941), the pedestrian was admittedly walking on the pavement when struck down. In both cases the Supreme Court of Indiana sustained the judgment for the plaintiff entered on the verdict of the jury.

It is thus clear that the Court of Appeals has erred in a fashion calling for a reversal by this Court. Either it has patently rejected the Indiana law, which it is not entitled to do, or it has stricken down an instruction on the ground that it fails to require proof of due care on the part of the plaintiff when in fact that requirement is very explicitly made in the instruction in question as well as in other places in the instructions given to the jury.

C. Instruction 16 is equally well grounded in Indiana law. See *Pfisterer* v. *Key*, 218 Ind. 521, 533-35, 33 N.E.2d 330 (1940); *American Carloading Corp.* v. *Gary Trust and Savings Co.*, 216 Ind. 649, 657, 25 N.E.2d 777 (1939). Indeed, the Court of Appeals made no challenge to the substantive command contained in No. 16. Instead it ruled that because No. 16 made reference to "these instructions", including No. 15, the error of No. 15 tainted No. 16 as well. "The instruction is, we believe, prejudicial when considered together with instruction 15." It would follow that if, as we have shown, there was no error in No. 15, there was none in No. 16.

It is respectfully submitted that the effect of the Court of Appeals' decision is to erase from the Indiana law the protection afforded by the Indiana legislature to pedestrians constrained to walk upon the highways of the state. It is obvious that this veto power has been removed from the hands of the federal courts, at least since 1938.

II. The Court of Appeals, in finding error in jury instructions on grounds not advanced to the trial court, rendered a judgment in conflict with Rule 51 of the Federal Rules of Civil Procedure, the decisions of this Court, and the decisions of other Courts of Appeals.

When instruction No. 15 was offered in the trial court, respondent objected to it only on the ground that "there was no evidence in the case that the defendant's driver was under an obligation to sound a horn by reason of facts known to him prior to that time," the objection resting on the theory that there was no duty to sound the horn because "the plaintiff has stated he knew of the approach of these cars." (App. 628.) As we have already demonstrated, this challenge was directly contrary to the decisions of the Indiana Supreme Court. (See p. 11, *supra*.) The Court of Appeals rested its conclusion on the ground that there was an "overemphasis" of the respondent's obligations. Had this objection been made to the trial court, the trial court would have had an opportunity to correct such an error, if indeed there was one. It is just for this reason that the Federal Rules of Civil Procedure, Rule 51, this Court, and other Courts of Appeals have established the rule that an objection to jury instructions will not be heard in the appellate court where it had not been first properly presented to the trial court. As this Court said in *Palmer* v. *Hoffman*, 318 U.S. 109, 119 (1943):

> "In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial."

Nor does the objecting party preserve his basis for review by asserting a wrong objection rather than a general

objection. Each equally deprives the trial court of the opportunity properly to correct any error that might exist. See, *e.g.*, *Sinclair Refining Co.* v. *Howell*, 222 F.2d 637, 641 (C.A. 5, 1955); *Allen* v. *Nelson Dodd Produce Co.*, 207 F.2d 296, 297-98 (C.A. 10, 1953); *Woodworkers Tool Works* v. *Byrne*, 191 F.2d 667, 676 (C.A. 9, 1951). Indeed the Seventh Circuit itself would seem to have recognized the rule at one time. See *Willits* v. *Yellow Cab Co.*, 214 F.2d 612, 615-16 (C.A. 7, 1954).

The rule is as important to the effective administration of the federal courts as it is to the rights of the parties. By entertaining new charges of defects in instructions at the appellate level, the Seventh Circuit invites defendants to withhold appropriate objections before the trial court and to await the outcome of the jury verdict. In the event of a verdict in favor of the defendant, it need do no more. In the event of a verdict in favor of the plaintiff, it will then be in a position to assert these errors—which might have been cured—as a basis for upsetting the jury's verdict. Decisions such as this can only spawn additional appeals and additional new trials, at a time when the federal judicial system is already overburdened with work. The judgment in this case ought not to be countenanced by this Court in the maintenance of its duties as overseer of the administration of the federal judicial system.

III. The judgment of the Court of Appeals should be reversed in the exercise of this Court's supervisory powers over the lower federal courts.

A reading of the preceding materials will demonstrate "that the charge as given by the trial court was both complete and correct." This is "a case where, in the exercise of [this Court's] supervisory powers over the lower federal courts, the judgment of the Court of Appeals should

be reversed in the interests of justice, and that of the District Court reinstated." *Gibson* v. *Lockheed Aircraft Service, Inc.*, 350 U.S. 356, 357 (1956).

CONCLUSION.

For the reasons heretofore set forth, petitioner respectfully requests that this Court issue a writ of certiorari to the Court of Appeals for the Seventh Circuit and reverse the judgment of that Court.

Respectfully submitted,

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APPENDIX.

In The
UNITED STATES COURT OF APPEALS
For The Seventh Circuit

No. 12216 SEPTEMBER TERM, 1957 APRIL SESSION, 1958

OWEN GOFF, JR., by Owen Goff, Sr., his father and next friend,
Plaintiff-Appellee,
v.
SEARS, ROEBUCK AND COMPANY, a corporation,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

July 14, 1958

Before MAJOR, HASTINGS and PARKINSON, *Circuit Judges.*

HASTINGS, *Circuit Judge.* Appellee brought this suit by his father and next friend to recover damages for personal injuries occasioned by the alleged negligence of a truck driver employed by appellant. This appeal is from a judgment entered by the trial court on a verdict of the jury assessing appellee's damages at $55,000. Appellant charges error in the trial court's denials of its motion for a directed verdict and of its motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. Errors additionally relied upon arise from various ruling on admission and exclusion of evidence and certain instructions to the jury the trial court and from alleged improper conduct by opposing counsel during the trial.

The accident upon which this action is based occurred around midnight, June 19, 1953, just south of Cook, Indiana, on U. S. Highway #41. This highway consists, at that point, of two northbound lanes and two southbound lanes divided by a parkway forty feet wide at the scene of the accident. It was a clear dry night, and the highway was unlighted. Appellee was returning home from work at a filling station located on the east side of the highway. His home was on the west side of the highway about one mile south of the filling station. He customarily went to work and home again on foot, and on this particular night, he was wearing his work clothes, a green shirt and pants, and was walking south. He testified that for a distance he walked along the ground east of the two northbound lanes. He observed no northbound traffic and crossed those lanes to the center parkway. As he crossed, he saw the lights of two vehicles approaching from the north on the southbound lanes about a quarter of a mile back. When he neared the southbound lanes, the two vehicles were about 300 feet north of him traveling at a speed of forty miles per hour and he knew that they were trucks running side by side, one passing the other. He did not attempt to cross the west pavement but *turned his back* to the traffic and proceeded south at an "average pace." His own testimony placed him on the parkway about a foot east from the edge of the southbound lanes, and he stated that he walked only a few steps before he received a blow on the back of his head and arm which knocked him down onto the parkway.

Appellant's driver testified that as he came alongside the other truck in passing he saw "something" and "hit his brakes," (meaning, as he explained, that he pushed the brakes as hard as he could) and veered to the right, away from the "object." He testified further that this object he saw (presumably appellee) was about a foot on the pavement, right about even with his left front fender. When he was almost stopped, he stated, the other truck passed him. There was no collision between the trucks.

The driver of the other truck, testifying by deposition, confirmed some of the material features of appellant

driver's testimony. He testified that he did not see a pedestrian prior to the accident, stating that "I never seen that person on the highway, never entered my mind." In response to a question as to what he did see, he answered: "Well, as I said before, he [appellant's truck driver] gets alongside of me and I could see who it was and everything, see it was a Sears truck, and he was almost nose to nose and all of a sudden * * * he jammed his brakes and his wheels started squealing. At that time I shot out * * *." Once past appellant's' truck, he testified that he could see from his rear view mirror that appellant's truck had pulled over onto the parkway.

Deputy Sheriff Peters of Lake County, who investigated the occurrence, received a call reporting the accident at 12:01 a.m. and arrived at the scene at approximately 12:19 a.m. On direct examination he testified that he was no evidence of tire marks or skid marks on the pavement and that the only marks of the truck on the parkway were those within the immediate vicinity where it had finally pulled off the road. He stated that he checked the parkway back behind the truck for some 300 yards and could find no evidence of tire marks, that is, no evidence that the truck had gone off the road in hitting the boy. There were some tire marks in the parkway, but he could not trace them to any particular vehicle. He testified that when he arrived appellee had been taken away from the scene of the accident. On cross-examination Peters was questioned about statements he purportedly made prior to the trial before an attorney for appellant and a court reporter. He had no recollection of the purported statements which were to the effect that, when he arrived at the scene, appellee was lying on the ground suffering from shock but with no visible injuries; and that his investigation revealed "skid marks where the truck had been braked." He was asked further whether he had made the statement: "It did not appear that the truck that hit the boy went off the pavement at all," but this was objected to as a conclusion of the witness who did not see the accident take place. This objection was sustained, the question

was stricken from the record and the jury was told to disregard it. (Appellant asserts this was prejudicial error.)

Appellant contends that there is no evidence establishing or tending to establish any negligence on the part of its driver, but rather that the evidence conclusively shows the accident was either caused, or contributed to, by appellee's own negligence in continuing to proceed along the highway with knowledge of the approach of the oncoming trucks and of his own obscurity due to his dark clothing, the fact that it was night and the highway was unlighted. For these reasons, it is argued, the trial court should have granted appellant's motion for directed verdict and its motion for judgment notwithstanding the verdict.

The question thus presented for our consideration is whether there is in the record any evidence which, together with all reasonable inferences to be drawn therefrom, tends to support plaintiff-appellee's case. *Heller v. Select Lake City Theatre Operating Co.*, 7 Cir., 187 F. 2d 649, 651 (1951). Appellee urges that there was ample evidence from which the jury could reasonably infer that he was in the exercise of due care for his own safety and that the accident was caused by appellant truck driver's negligence in swerving off the pavement while passing the other truck. The evidence, taken in the light most favorable to appellee, indicates that he was walking at night, along an unilluminated highway, wearing dark clothing with his back to oncoming traffic and about a foot from the edge of the pavement. He was aware of the nearness of the oncoming trucks and also knew that one of them was proceeding in the lane nearest the parkway in which he was walking. There was no positive evidence that the truck swerved off the parkway; the witness for appellee, Deputy Sheriff Peters, testified simply that he found no tire marks which could be traced to any particular vehicle. Appellant's truck must have, even under appellant truck driver's version of the accident, veered close to the east edge of the twenty-four foot lane in passing the other truck. If the jury believed appellee's testimony that he

was about a foot from the edge of the highway and, consequently, disbelieved the testimony of appellant's truck driver, who placed "the object" he saw about a foot on the pavement, then it could reasonably infer that appellant's truck driver negligently swerved off the roadway in striking appellee. Counsel for appellant, in oral argument, indicated that his case rested on the premise that appellee was on the pavement. Since there were conflicting versions, based on credible evidence, of the way in which the accident occurred, the trial court quite properly left it to the jury to determine the facts and any inferences to be drawn from them.

Appellant would have us hold that appellee was guilty of contributory negligence, as a matter of law, in walking one foot from the pavement (giving full weight to appellee's credible testimony) dressed as he was, on a clear night along a dark highway, and that, therefore, the case should not have gone to the jury. Appellant refers, in this connection to an Indiana statute providing that when there are no sidewalks, "any pedestrians walking along and upon * * * [a] highway shall, when practicable, walk only on the left side of the roadway, or its shoulder, facing traffic which may approach from the opposite direction." Burns Ind. Ann. Stat. § 47-2035(c) (1952 Repl.). Assuming this statute is applicable to a pedestrian on a parkway, we have been cited to no cases in which Indiana courts have held a violation of this statute to constitute negligence *per se*. The rule appears to be that a violation of a statute would be actionable negligence only if the violation were the proximate cause of the resulting injury. *Northern Indiana Transit, Inc.* v. *Burk*, 228 Ind. 162, 171-172, 89 N.E. 2d 905, 909 (1950) and cases cited therein. Appellant relies heavily on *Keller* v. *Breneman*, 279 P. 588 (1929) involving a similar statute in the State of Washington. There, the court held that "whatever may be the rule elsewhere, [in this state] it is negligence in itself to violate a positive rule of the statute." (*id.* at 590) To the contrary are decisions of the Illinois courts in construing a similar provision. *Blumb* v. *Getz*, 366 Ill. 273,

8 N.E. 2d 620 (1937); *Rowley* v. *Rust*, 304 Ill. App. 364, 26 N.E. 2d 529 (1940). Considering the manner in which appellee was dressed, the fact that it was night and the highway dark, it is a close question of fact whether or not (with due consideration to the duty of the driver to exercise reasonable care in keeping a lookout for pedestrians) appellee was guilty of contributory negligence that would bar his recovery. It was, nevertheless, a question of fact for the jury, *Pfisterer* v. *Key*, 218 Ind. 521, 531, 33 N.E. 2d 330, 334 (1941), and we hold that the trial court did not err in submitting the case to the jury or in denying appellant's subsequent motion for a judgment notwithstanding the verdict.

When a question of fact is properly raised by the proof, as in this case, this court will not set aside a jury's findings absent prejudicial error in the trial court's interpretation of the law, or its instructions to the jury. *MacDonald* v. *Milwaukee Mechanics' Insurance Co.*, 7 Cir., 167 F. 2d 276, 277 (1948). Appellant contends, however, that the trial court committed such error in, among other things, giving plaintiff-appellee's instructions 15 and 16.

Plaintiff's instruction number 15, complained of by appellant, provided as follows:

"The court instructs you that there was in full force and effect on and prior to June 19, 1953, a statute of the State of Indiana which provided that every person driving or operating a motor vehicle shall slow down and give a timely signal with the horn or other device for signaling when approaching a pedestrian walking or standing upon the traveled part of any highway.

"If you find from the preponderance of the evidence and under the instructions of the court that the defendant operated its tractor and trailer in violation of the above and foregoing statute on the occasion in question and that the defendant carelessly and negligently failed to slow down and to give such a timely signal when approaching the plaintiff, and that the

plaintiff was then walking or standing upon the traveled part of highway U.S. 41; and that the plaintiff was then injured as a direct and proximate result of the defendant's negligence, if any, and if you further find from a preponderance of the evidence that at the time of the occurrence complained of and at all times prior thereto the plaintiff was in the exercise of ordinary care for his own safety, then you should find the defendant guilty."

This instruction was objected to on the ground that there was no evidence in the case to indicate that defendant was under an obligation to sound a horn. *The testimony of appellee himself was that he was fully aware of the position of the approaching trucks a short distance from him.* The evidence further shows that appellee walked with his back to traffic in the night dressed in dark clothing. Under such circumstances it is more than a possibility that the truck driver would not have seen appellee in time to stop or give a signal even though he used such diligence in the exercise of reasonable care as would enable him to observe pedestrians on the highway. *American Carloading Corp.* v. *Gary Trust Savings Bank, Admr.*, 216 Ind. 649, 657, 25 N.E. 2d 777, 781 (1940). It is difficult to see how, under such circumstances, there could have been any duty on the part of the driver to sound the warning. In the exercise of reasonable care, a driver may expect reciprocal conduct on the part of the pedestrian, *American Carloading Corp.* v. *Gary Trust Savings Bank, Admr., supra* at 658, 25 N.E. 2d at 781, and since the evidence shows that it was entirely possible the pedestrian's own conduct in placing himself in a position of danger was the proximate cause of the injury, the instruction to the jury was erroneous in overemphasizing the duty of the driver *to slow down and give a timely signal.* Under the evidence in this case, this instruction should not have been given because, in effect, it shielded appellee against the appellant's sole contention that appellee was at fault in negligently walking on the highway. It did this by emphasizing the duty of the driver to all pedestrians

standing or walking on the highway, while minimizing the duty of appellee to exercise due care for his own safety. The instruction is, moreover, peremptory in its terms, concluding with a mandate to the jury to find the appellant guilty if it should find that he was negligent in failing to sound a horn or slow down.

Plaintiff's instruction 16 also directed a finding of guilty if the jury should find under the court's instructions that the driver, by using his faculties, could and would have discovered appellee in time to avoid striking him and "that he negligently failed to do so, as charged in the plaintiff's complaint and as elsewhere set forth in these instructions." It is urged by appellant that by referring to the complaint and other instructions summarizing the pleadings, the court permits the assumption by the jury that there is evidence to support the charges. The instruction is, we believe, prejudicial when considered together with instruction 15.

As we have previously indicated this case turns upon a close question of liability which the trial court properly left for the jury to determine. Because of the closeness of the factual determination made, however, we do not see how the erroneous portions of the trial court's charge could other than have prejudiced the outcome. For this reason we held that the trial court erred in not granting appellant's motion for a new trial. In light of our holding we need not consider the other errors urged by appellant.

The judgment of the district court is reversed, and this cause is remanded for a new trial.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 530

OWEN GOFF, JR., by Owen Goff, Sr., his father and next friend,

Petitioner,

vs.

SEARS, ROEBUCK AND COMPANY, a corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Petitioner's jurisdictional statement is substantially correct. However, Petitioner's Statement (Pet. p. 2) is inaccurate and incomplete.

STATEMENT.

In striving to present a parallel between *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, and the situation at bar, Petitioner has, perhaps unwittingly, misdescribed the factual and legal background of the *Erie* case. Moreover, Petitioner has taken liberties with the record here, in asserting that Respondent's driver "admittedly saw Petitioner (Pet. p. 3)."

The Circuit Court of Appeals did not "upset the judgment (Pet. p. 3)" in *Erie R.R. Co.* v. *Tompkins*. On the contrary, it affirmed a judgment on the verdict for plaintiff in the sum of $30,000 (90 F. 2d 603, 604; 304 U.S. 64, 70). Tompkins was not, as Petitioner indicates (Pet. p. 3) "walking along a large traffic artery" in the highway sense. He was using a longitudinal pathway along the railroad right of way. This Court took the *Erie* case because the Circuit Court of Appeals, following *Swift* v *Tyson*, 16 Pet. 1, 18, refused to consider the railroad's claim that under Pennsylvania law no duty other than to abstain from wilful and wanton injury was owed to Tompkins. No question of jury instructions was involved. In its opinion, this Court denied the existence of any general Federal common law applicable to diversity cases, and directed the Circuit Court of Appeals to consider and determine the state of the applicable Pennsylvania law. After reversal, the Circuit Court of Appeals in *Tompkins* v. *Erie R.R. Co.*, 98 F. 2d 49, finding that the railroad's view of the Pennsylvania law was correct, remanded the case to the District Court with directions to enter judgment for defendant.

Petitioner's Theory Below.

Petitioner's original Complaint in this case alleged that he was walking southerly on the east berm (shoulder) of U. S. Highway 41, near Cook, Indiana, when the accident occurred (App. 3). Just before trial, the Complaint was amended to allege that Plaintiff was walking in the parkway separating the northbound and southbound sections of the highway, not on the "berm" (App. 16). Plaintiff's whole case was presented in the trial court upon the theory that he was *not upon the highway* when struck (Amended Complaint Par. 10 (A)-(L); App. 17).

The Evidence

Petitioner testified that he was in the parkway about one foot west of the pavement when he was hit (App. 335). He admitted that he had seen the trucks approaching from his rear, not once, but twice (App. 332, 333). Petitioner further admitted that after observing the approaching trucks the second time, he continued to walk along the left side of the highway "just a few steps" (App. 401-402).

Respondent's driver did not admit he saw Petitioner. Petitioner's statement (Pet. p. 3) "the driver * * * admittedly saw the Petitioner at a distance of 30 feet or more (App. 554, 555)" is not justified by the record pages referred to, nor is it warranted by anything in the record.

This driver, Earl Peifer, who was driving south on the inner lane of U. S. Highway 41, testified (App. 534) that up to the time he came upon him (plaintiff) he hadn't seen anything but the Foster truck (the truck alongside him) on the highway. Peifer went on: "The next thing I was just almost up alongside of him and I seen *something*. Then I hit the brakes * * *. I saw something up there. I did not know for sure what it was * * *. It was about a foot on the road * * * about to the left front fender of the tractor."

The driver of the Foster truck (which Peifer was passing) testified he didn't see any pedestrian * * * I never seen that person on the highway, never entered my mind." (App. 617).

On cross-examination Peifer, Respondent's driver, wasn't asked whether he saw Petitioner. He was asked how far ahead he could see an object in front of his headlights such as a man or big boy standing up and walking along. His reply was "I don't really know in feet." On being asked for an "estimate" he then said "I would guess possibly 30 feet, maybe further." (App. 554)

Again (App. 556) he was asked "Did you see a human being on the road at any time before your truck hit him?" and Peifer replied "All I seen was an object. I don't know what it was." He was subsequently asked: "Did you see anything 30 feet ahead of you, sir, or 50 feet ahead of you that night before you struck it", to which he replied "I would say possibly 30 feet."

Deputy Sheriff Peters of Lake County, Indiana, who investigated the accident, testified that there were tire marks where the vehicle had pulled off the road within the immediate vehicle itself (App. 117), 100 feet or more beyond the scene of the occurrence (App. 117, 537). The accident occurred about midnight (App. 112). Plaintiff had been up and down the road for a period of a year or more at the time of the occurrence, and was wearing a green shirt and matched pants—the uniform of a filling station attendant (App. 328).

On this state of facts, the Court of Appeals for the Seventh Circuit, in its opinion, held that "Considering the manner in which the Appellee was dressed, the fact that it was night and the highway dark, it is a close question of fact whether or not (with due consideration to the duty of the driver to exercise reasonable care in keeping a lookout for pedestrians) Appellee was guilty of contributory negligence which would bar his recovery. It was nevertheless, a question of fact for the jury. *Pfisterer* v. *Kew*, 218 Ind. 521, 531; 33 N.E. 2d 330, 331." (Pet. App. p. 6a).

In commenting upon the necessarily prejudicial effect of the erroneous portions of the trial court's charge, the Court of Appeals further stated in its opinion (Pet. App. 8a): "As we have previously indicated this case turns upon a close question of liability which the trial court properly left for the jury to determine.

The Instructions

Petitioner made no reference in his statement to other instructions presenting Petitioner's theory of the case, included in the Court's charge.

By Plaintiff's Instruction No. 1 (App. 681), the jury was told of the Indiana horn blowing statute which required a driver to give audible warning where reasonably necessary to insure safe operation, and peremptorialy directed a finding of guilty if the jury should find it was reasonably necessary to give that warning, and defendant negligently failed to do so, thus proximately causing the accident.

By Plaintiff's Instruction No. 13 (App. 681, 682), the jury was advised of the Indiana headlight statute and again were peremptoriiy directed to return a verdict of guilty if defendant's lights were not so aimed or of sufficient intensify to reveal a person at least 100 feet ahead, thus negligently proximately causing the accident. By Plaintiff's Instruction No. 12 (App. 683), the jury were again peremptorily directed to return a verdict of guilty if defendant was operating its vehicle at a speed greater than is reasonable and prudent under the conditions and actual and potential hazards then existing which negligently and proximately caused the accident.

We take issue with Petitioner's claim (Pet. p. 6) that the Court of Appeals found error in Instructions 15 and 16 "*but not on the grounds offered by Respondent.*"

Petitioner is here seeking to show that the Court below refused to apply Indiana law, in part, by lifting portions of its opinion out of context. The Court of Appeals actually decided the case on the very "grounds" urged by Respondent.

Thus, as to Instruction No. 16, the Court of Appeals said (Pet. App. 7a):

> "This instruction was objected to on the ground that there was no evidence in the case to indicate that defendant was under an obligation to sound a horn. *The testimony of appellee himself was that he was fully aware of the position of the approaching trucks a short distance from him.* The evidence further shows that appellee walked with his back to traffic in the night dressed in dark clothing. Under such circumstances it is more than a possibility that the truck driver would not have seen appellee in time to stop or give a signal even though he used such diligence in the exercise of reasonable care as would enable him to observe pedestrians on the highway. *American Carloading Corp. v. Gary Trust Savings Bank, Admr.*, 216 Ind. 649, 657, 25 N.E. 2d 777, 781 (1940). It is difficult to see how, under such circumstances, there could have been any duty on the part of the driver to sound the warning." (Italics by the Court)

And as to Instruction 16, the Court of Appeals said (Pet. App. 8a):

> "Plaintiff's instruction 16 also directed a finding of guilty if the jury should find under the court's instructions that the driver, by using his faculties, could and would have discovered appellee in time to avoid striking him and 'that he negligently failed to do so, as charged in the plaintiff's complaint and as elsewhere set forth in these instructions.' It is urged by appellant that by referring to the complaint and other instructions summarizing the pleadings, the court permits the assumption by the jury that there is evidence to support the charges. The instruction is, we believe, prejudicial when considered together with instruction 15."

QUESTION PRESENTED.

There is actually only one question presented here: Whether, in view of all of the facts and circumstances in the case, the judgment of the Court of Appeals correctly reversed and remanded the cause for a new trial because of prejudicial error in the Court's charge. Petitioner's claim that the Court of Appeals adopted grounds for error not assigned in the trial court is without substance.

REASONS FOR DENIAL OF THE WRIT.

The Court of Appeals correctly applied the applicable Indiana Law as illustrated by the very authorities relied upon by Petitioner, in the light of all the facts and circumstances in the case. There is no conflict here with *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64, or any other decision of this Court or other Courts of Appeals. (Pl.)

ARGUMENT

I.

THE COURT OF APPEALS CORRECTLY APPLIED THE INDIANA LAW IN ITS DECISION IN THIS CASE

The Court of Appeals correctly applied the substantive law of Indiana in this case. It did so to the detriment of Respondent, who urged strenuously in that Court that its motion for judgment notwithstanding the verdict should have been granted in the trial court because Petitioner, who saw the approaching vehicles not once, but twice, continued to walk along the side of the highway in the same direction as traffic, notwithstanding the indistinguishable clothing he was wearing.

In *Pfisterer* v. *Key*, 218 Ind. 521 and *American Gas Loading Corporation* v. *Gary Trust and Savings Bank*, 216 Ind. 649, the Supreme Court of Indiana was principally concerned whether defendant's motion for judgment notwithstanding the verdict or defendant's motion for a new trial on the ground that the verdict was contrary to law should have been granted.

In *Pfisterer* v. *Key*, 218 Ind. 521, a 15-year old boy who was killed, was walking on the left side of the road, facing oncoming traffic at 7:30 p.m. on June 21 (218 Ind. at 526). The companion of the driver of the car testified that he saw the boy when he turned a curve, but did not see him thereafter until immediately prior to the accident. The driver testified that he did not see the boy until the front of the car was within 15 to 20 feet of him and that at that time the boy was walking with his head downward and the driver testified that he did not think the boy saw or heard the approach of the car and that at that time there was insufficient time to sound a horn or to give other signal

The question decided by the court was whether the boy was guilty of contributory negligence as a matter of law. The court held that while there was no question in that case as to the negligent conduct of the driver of the automobile (his companion had seen the boy), with respect to the decedent, since there was no obstruction between the two the jury had a right to infer that the decedent did see and hear the car and had a right to assume that the driver had seen him and would drive accordingly.

American Carloading Corp. v. Gary Trust & Savings Bank, Admr., 216 Ind. 649, arose out of an accident in which the decedent was killed while walking along the right side of 5th Avenue in the City of Gary, Indiana. At this place in the city no sidewalks were provided for pedestrians. There was evidence from other witnesses as to the condition of the way with respect to obstructions and the like. Thus the truck driver stated he could have seen a person 200 feet ahead of him if his vision had not been obstructed by an intervening automobile; however one of plaintiff's witnesses testified that he watched the truck go by and followed to the point of the accident and (216 Ind. 659) "that while he was waiting for the trucks to pass no other automobiles passed east on the street, preceded the trucks or passed him or the trucks while he was trailing them." On this state of the record the jury specifically found in answer to interrogatories that the operator of the truck did not keep a lookout ahead of his truck; that decedent was in plain view of the driver at the time; and that the driver could have stopped the truck and avoided the accident. In the case at bar, of course, petitioner admittedly knew that the trucks were approaching. In the *American Carloading* case there was no such proof (216 Ind. 656).

The *American Carloading* case involved a given instruction somewhat similar to Instruction No. 15 at bar, with one very significant difference. The instruction held proper by the Supreme Court of Indiana contained the language (216 Ind. 249 at p. 261):

> "If you find from the evidence that the driver of defendant's truck that struck the decedent * * * could have seen the decedent walking ahead of his truck for a distance of 200 feet."

The failure of Instruction 15 at bar to include language similar to this was the principal ground for objection urged to that instruction in the trial court; *i.e.* there is no evidence in this case that defendant's driver was under an obligation to sound a horn by reason of any facts known to him prior to the time when the sounding of a horn would be too late (App. 628), which was adopted by the Court of Appeals when it determined (Pet. App. 7a) "Under such circumstances it is more than a possibility that the truck driver would not have seen the appellee in time to stop or give a signal, even though he used such diligence in the exercise of reasonable care as would enable him to observe pedestrians on the highway."

This instruction is peremptory—it directs a finding of guilty. Since it does not include all of the elements essential to such a finding, the vice in the instruction is basically a matter of procedure, not of substantive law. From a procedural standpoint as to such instructions in Indiana, as in Illinois, in accordance with the prevailing general rule, the law is the same: Peremptory instructions are not favored (*American Carloading Corp.* v. *Gary Trust and Savings Bank*, 216 Ind. 649, 662, 663; *Keeshin Motor Express* v. *Sowers*, 221 Ind. 440, 448) "Where * * * the instruction is peremptory in character and directs a verdict

for either party, it must necessarily contain all the facts and be complete within itself; it cannot be cured by any other instruction in the series." (*Duffy* v. *Cortesi*, 2 Ill. 2d 511, 516). *Indianapolis Traction & Terminal Co.* v. *Matthews*, 177 Ind. 88, 105, and *Keeshin Motor Express* v. *Sowers*, 221 Ind. 440 446, are to the same general effect.

Instruction No. 15 in the form given by the District Court directed the jury to find defendant guilty even though the jury did not find that Respondent's driver either saw Petitioner or could have seen him in time to slow down or sound warning. In a case in which Petitioner's whole theory was that he was not even on the highway, in which Petitioner admitted seeing and being conscious of the approaching trucks, and in which there is no substantial evidence that Respondent's driver saw or could have seen Petitioner in time to avoid the occurrence, the instruction was unquestionably erroneous and prejudicially so.

The case was not tried either in the trial court or in the Court of Appeals on any theory of "last clear chance." Of course, even aside from this, no such theory is properly involved in the instruction being considered and it was for this reason that the instruction itself was erroneous. The doctrine of "last clear chance" presupposes an opportunity on the part of Respondent's driver to avoid the occurrence, and no such element was included in the instruction as tendered and given. (App. 680)

The error in Instruction No. 16 is obvious. This too, was a peremptory instruction, and far from containing within itself all of the facts necessary to establish liability, referred the jury to plaintiff's complaint and to the other instructions, including Instruction No. 15, for the purpose of determining what action on the part of Respondent's driver would warrant a finding of guilty. The

instruction was objected to in the trial court on this specific ground. (App. 628) The Court of Appeals correctly held that the prominence thus unduly given to plaintiff's theory, necessarily prejudiced Respondent.

II.

THE COURT OF APPEALS DID NOT FIND ERROR IN THE INSTRUCTIONS ON GROUNDS NOT ADVANCED TO THE TRIAL COURT.

As we have already pointed out, the assertion that the Court of Appeals found error in the instructions on grounds not advanced to the trial court, represents an interpretation of counsel not warranted by the opinion in the case.

What Petitioner has done is to look to the reasons advanced by the Court of Appeals for finding prejudice in the instructions and to interpret these as constituting the grounds upon which error was found. In our statement, we have submitted verbatim the applicable portions of the Court of Appeals' decision on this point. The Court of Appeals' opinion in this regard does not warrant the construction placed upon it by Petitioner.

III.

THERE IS NO BASIS FOR THE REVERSAL OF THE JUDGMENT IN THE EXERCISE OF THIS COURT'S SUPERVISORY POWERS.

As we believe we have demonstrated, the Court of Appeals' opinion in this cause was not erroneous in the respects criticized by Petitioner. There is, therefore, of course, no occasion for any exercise of this Court's supervisory powers.

CONCLUSION.

For the reasons heretofore set forth, Respondent respectfully submits that the Petition for Writ of Certiorari to the Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

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